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Nos. 84-1718 and 84-1760

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In the Supreme Court of the United States

OCTOBER TERM, 1984

HUBERT T. CRABTREE, PETITIONER

v.

UNITED STATES OF AMERICA

SALVADOR CANALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court applied the wrong standard in denying petitioners' applications for post-conviction bail pending appeal.

2. Whether application of the new statutory standard for bail pending appeal to petitioners, who committed the crimes for which they have been convicted prior to passage of the Act but who were sentenced after its enactment, violates the Ex Post Facto Clause of the Constitution.

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No. 84-1718

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OPINIONS BELOW

The opinion of the court of appeals in No. 84-1718 (84-1718 Pet. App. A1-A5) is reported at 754 F.2d 1200. The opinion of the court of appeals in No. 84-1760 (84-1760 Pet. App. 2-3) is not yet reported. The opinion of the district court in both cases (Pet. App. 7-11) is unreported.[1]

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[1]Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 84-1760.

JURISDICTION

The order of the court of appeals denying bail pending appeal in No. 84-1718 was entered on February 22, 1985. The petition for a writ of certiorari was filed in that case on April 22, 1985. The order of the court of appeals denying bail pending appeal in No. 84-1760 was entered on February 4, 1985. A petition for rehearing was denied on March 28, 1985. The petition for a writ of certiorari was filed in that case on May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Comprehensive Crime Control Act of 1984, 18 U.S.C. 3143,[2] states in pertinent part:

> (b) RELEASE OR DETENTION PENDING APPEAL BY THE DEFENDANT. — The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds —
>
> (l) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

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[2]The Act is Pub. L. No. 98-473, 98 Stat. 1979 *et seq.* Although its provisions are too new to appear in the current edition of the United States Code, we cite to the Code, as amended by the Act, for ease of reference. The revised 18 U.S.C. 3143(b) appears at 98 Stat. 1981.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisana, petitioners were convicted of racketeering, in violation of 18 U.S.C. 1962, based on criminal acts occurring between 1979 and 1981. Petitioner Crabtree was sentenced to concurrent three and one-half year terms of imprisonment on each of two counts and a total fine of $25,000. Petitioner Canale was sentenced to two and one-half years' imprisonment on one count and a fine of $15,000. On a second count he was fined an additional $15,000 and sentenced to five years' imprisonment, which was suspended in favor of three years' probation. The district court, applying the new standard governing bail pending appeal prescribed by the Comprehensive Crime Control Act of 1984, 18 U.S.C. 3143(b), denied petitioners' applications for release pending appeal. By separate orders the court of appeals sustained that ruling in each case.

1. Following petitioners' convictions, in an order dated January 2, 1985 (Pet. App. 4-5), the district court alerted counsel to the applicability in these cases of the provisions of the Comprehensive Crime Control Act of 1984 relating to release pending appeal. Thereafter, on January 23, 1985, petitioners each filed a motion for release on bond pending appeal. In his motion, petitioner Crabtree argued that he intended to raise five "serious issues" on appeal,[3] that the appeal was not frivolous or taken for delay, and that he was not likely to flee the jurisdiction pending appeal (84-1718 Pet. 4). Petitioner Canale asserted in his motion that application to him of the Bail Reform Act of 1984 constituted a violation of the Ex Post Facto Clause of the Constitution. If

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[3]They are: (1) the temporary presence on the jury panel of a juror allegedly tainted by knowledge of a co-defendant's prior conviction; (2) lack of evidence of two separate predicate acts; (3) error in the district court's ruling on "*James*" motions; (4) impropriety of government counsel's rebuttal argument; and (5) inadmissibility of tape recordings of petitioner's wife. See 84-1718 Pet. App. A7.

the Act were held applicable he argued that he should be released on bond pending appeal because (1) he was not likely to flee or pose any danger to the community, (2) the appeal was not for purposes of delay, and (3) he raised substantial issues likely to result in reversal.[4]

Following a hearing on January 23, 1985, the district court denied petitioners' motions for release on bond pending appeal on January 25, 1985 (Pet. App. 7-11), stating (*id.* at 8) that it had "no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal on appeal" and that there were no "substantial questions of law or fact which will result in an order for a new trial." The district court held further that the application of the new bail standards to petitioners did not violate the Ex Post Facto Clause of the Constitution because the provisions of the Act were regulatory in nature and did not effect an enhancement of punishment (Pet. App. 10).

2. The court of appeals, acting through Chief Judge Clark sitting individually, denied Crabtree's application for release pending appeal on February 22, 1985 (84-1718 Pet. App. A1-A5).[5] Judge Clark found that Crabtree had "failed to carry the burden imposed on him [by 18 U.S.C. 3143(b)] to show that his appeal is likely to result in reversal or a new trial order" (84-1718 Pet. App. A3) and that the application

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[4]Canale indicated his intention to raise the following matters on appeal: (1) denial of his motion to dismiss indictment; (2) denial of a motion in limine; (3) prosecutorial misconduct; (4) prejudicial comments made by the court; and (5) denial of a motion to sever. See 84-1760 Pet. 18-25.

[5]Crabtree applied to Chief Judge Clark "as a judicial officer authorized to order release from detention pending appeal under 18 U.S.C. § 3141 to allow him to retain his bail status pending appeal of the district court's ruling on his application" and the court of appeals' "ruling on his appeal from his conviction and sentence" (84-1718 Pet. App. A2).

of the Act to him did not violate the Ex Post Facto Clause. Judge Clark found it unnecessary to reach the question whether Crabtree had established, as required by the amended 18 U.S.C. 3143(b), that his appeal was not taken for purposes of delay and raised substantial issues. Given his failure to present a transcript of the proceedings below, the court found that Crabtree had failed "to carry the burden imposed on him to show that his appeal is likely to result in reversal or a new trial order" (84-1718 Pet. App. A3). Judge Clark observed that "Crabtree acknowledges that the issue he raises as to improper argument of counsel must depend on an examination of the transcript," while the remaining issues raised in his brief are discussed in factual terms "without record support" (*ibid.*).[6] He noted that unlike the district court, which had denied Crabtree's application for bail pending appeal in the first instance and which was conversant with the contents of the record pertinent to Crabtree's claims, the court of appeals was in no position to undertake "any meaningful review or independent reconsideration" absent "a proper transcript or stipulated factual record" (84-1718 Pet. App. A4). Judge Clark made clear that his ruling was without prejudice to "what a subsequent judicial officer or panel of this court might rule" on any issue underlying a renewed request for relief supported by an appropriate record (*ibid.*).

Judge Clark did reach and reject Crabtree's claim that the application of the new standard for bail pending appeal to his case violated the Ex Post Facto Clause. The court determined that the changes in standards for bail pending appeal effected in 1984 were procedural in nature and did

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[6]Given that no transcripts accompanied the application, Judge Clark reasoned that "[r]egardless of whether this application should be considered as a review of the action of the district judge and, if so, whether the proper standard of review is abuse of discretion or the clearly erroneous test, or whether the application is addressed to me for independent action, I must refuse relief" (84-1718 Pet. App. A3).

not alter any substantial right, increase punishment, or change the ingredients of the offense or the facts necessary to establish guilt (84-1718 Pet. App. A4-A5).

3. Petitioner Canale filed a petition for writ of mandamus with the court of appeals, alternatively requesting bail pending appeal from the court of appeals or a stay of the district court's order. On February 4, 1985, a panel of the court of appeals denied the requested relief without opinion (Pet. App. 14). Thereafter, Canale applied for rehearing of the order of the court of appeals. On March 28, 1985, a panel of that court entered an opinion denying all relief requested by Canale (Pet. App. 2-3).

The court of appeals rejected Canale's assertion that the district court "misconstrued the new act's requirement that he demonstrate that his appeal 'raises a substantial question of fact or law likely to result in reversal or an order for a new trial' " (Pet. App. 2). Based upon a "careful[] review[]" of the remarks of the district court, the court of appeals rejected Canale's contention that the district court had erroneously "believed it could not permit him to remain at large without admitting that it had committed reversible error during his trial" (Pet. App. 3). Aligning itself "generally with the views of the Third and Ninth circuits" (citing *United States* v. *Miller*, 753 F.2d 19 (3d Cir. 1985), and *United States* v. *Handy*, 753 F.2d 1487 (9th Cir. 1985)), the court of appeals endorsed Canale's contention (also embraced by the government) that, in order to meet the requirement that an appeal raise "a substantial question," a defendant need not persuade the district court effectively to recognize that it had committed reversible error (Pet. App. 3). Rather, "the statutory reference is to a presence in the case of at least one fairly debatable or substantial issue of the type that calls in serious question the correctness of the judgment of conviction" (*ibid.*). Based upon its review of the district court's comments at the hearing of January 23, 1985, the court of appeals was persuaded that "this is the

standard which [the district court] applied," and "not some notion that the statute required a confession of error" (*ibid.*).

The court of appeals also rejected Canale's claim that the application of the Bail Reform Act violated the Ex Post Facto Clause (Pet. App. 2), citing the opinion in *Crabtree* as dispositive.

ARGUMENT

The petitions present two questions concerning the application of the new standards for bail pending appeal presented by the Comprehensive Crime Control Act of 1984. Neither has produced any material division of authority among the courts of appeals; indeed, the decisions below are supported by congruent decisions of many other circuits. Nor do the rulings below conflict with any decision of this Court. Further review is plainly unwarranted.

1. Petitioners argue that the application of the more stringent standard for bail pending appeal prescribed by the new Act "effectively increased the punishment for the criminal acts alleged to have been committed by applicant" (84-1760 Pet. 27; 84-1718 Pet. 15), and accordingly is violative of the Ex Post Facto Clause of the Constitution. The court of appeals rejected this claim in *Crabtree* (84-1718 Pet. App. A4-A5) and adhered to that view in *Canale* (Pet. App. 2).

All of the courts of appeals that have considered this question following enactment of the new bail standards have reached the same conclusion as the court below. Thus, in addition to the decisions of the court below, challenges to the applicability of the new bail Act under the Ex Post Facto Clause have to date been rejected in *United States* v. *Miller*, 753 F.2d 19, 21 (3d Cir. 1985), *United States* v. *Molt*, 758 F.2d 1198 (7th Cir. 1985), *United States* v. *Coulombe*, No. 84-2430 (8th Cir. May 1, 1985), slip op. 13,

United States v. *Affleck*, No. 85-1009 (10th Cir. May 24, 1985), slip op. 9-16, and *United States* v. *Ballone*, No. 85-3171 (11th Cir. May 24, 1985). For their challenge to this consensus view petitioners rely primarily upon district court rulings that have by now been rejected in their respective circuits. See 84-1760 Pet. 28; 84-1718 Pet. 17.[7] There is no reason for further review of the ex post facto issue. The uniform view of the courts of appeals is not inconsistent with any decision of this Court. And while the change in bail standards may work against the interest of defendants, this is not a sufficient indication that the statutory change is impermissibly retroactive under the Constitution. See *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977); *Portley* v. *Grossman*, 444 U.S. 1311 (1980) (Rehnquist, Circuit Justice). The change in the standard for bail pending appeal does not change the "quantum of punishment attached to the crime" (*Dobbert*, 432 U.S. at 294); it merely alters the likelihood that a defendant convicted of a crime will begin serving his assigned sentence (the length of which is not altered) at an early date.

2. Petitioners' remaining argument (84-1760 Pet. 10-15; 84-1718 Pet. 6-11) is that the standard applied by *the district court* to determine their eligibility for release pending appeal is inconsistent with decisions of the Third and Ninth Circuits. This contention also warrants no further review.

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[7] All but one of the district court rulings cited by petitioners have been overruled by subsequent holdings of their respective circuits. The sole exception is *United States* v. *Mitchell*, No. CR-83-0130 (N.D. Cal. Jan. 4, 1985). However, contrary to petitioner Canale's suggestion (84-1760 Pet. 28), *Mitchell* is plainly inapposite. The court there expressly held that its decision "does not reach the ex post facto issue or the constitutional challenges" to the Act (slip op. 2). Rather, the district court construed the *pre-trial* detention provisions of the Act to be inapplicable to defendants already admitted to bail prior to passage of the Act. Neither petitioner in this case is similarly situated.

All of the courts of appeals that have interpreted the standard for bail pending appeal prescribed by amended 18 U.S.C. 3143(b)(2) to date have agreed that the new statute mandates a two part test. They agree that under the new Act a defendant must show, first, that a substantial question has been raised on appeal from the judgment of conviction, and second, that if decided in the defendant's favor, the issue raised would result in reversal of the conviction or an order for a new trial on all counts on which the defendant was sentenced and not merely some more limited other relief or a finding that any error was harmless.[8] *United States* v. *Randell*, No. 85-1150 (2d Cir. May 3, 1985); *United States* v. *Miller, supra*; *United States* v. *Polin*, No. 85-5009 (4th Cir. Mar. 4, 1985) (opinion of Murnaghan, J., sitting individually); *United States* v. *Valera-Elizondo*, No. 84-2715 (5th Cir. May 14, 1985); *United States* v. *Coulombe, supra*; *United States* v. *Handy*, No. 85-3001 (9th Cir. May 21, 1985) (amended opinion); *United States* v. *Giancola*, 754 F.2d 898 (11th Cir. 1985). Finally, while some variations exist in the formulations used to flesh out the "substantial question" prong of the test, all of the courts of appeals are in agreement that Congress significantly elevated the threshold over the level that prevailed under prior law, and, at the same time, that Congress did not limit bail pending appeal to cases in which the district court was willing to certify its own error by finding that reversal on appeal was more likely than not to ensue. The Fifth Circuit's opinion in *Valera-Elizondo, supra*, like its opinion in *Canale* (Pet. App. 3), makes clear that it joins in this consensus.

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[8]These two criteria are in addition to the requirement of 18 U.S.C. 3143(b)(1) that the defendant establish that he does not present an undue flight risk, or a danger to particular persons or the community if released.

Against this background, the only issue the petitions frame is whether the court of appeals erred in concluding that the district court had not applied a standard that would have required it to confess its own error in order to grant bail pending appeal.[9] This fact-bound issue, which turns entirely on the court of appeals' assessment of the district court's remarks at the hearing preceding its written opinion, assuredly lacks any continuing general importance. We note, moreover, that as to petitioner Crabtree, the court of appeals never even had occasion to interpret the district court's ruling. Rather Crabtree's application was rejected because of his procedural default, which made it impossible for the court of appeals to assess any material aspect of his claim. See pages 4-5, *supra*. Because of that default, and because the court of appeals held out to Crabtree the opportunity to seek relief anew on a proper record, further review is especially inappropriate in his case.

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[9]Neither petitioner directly raises the underlying question whether he is in fact entitled to bail under the standards applied by the courts of appeals generally. Each does, however, canvass briefly the issues he anticipates raising on appeal (84-1718 Pet. 11-14; 84-1760 Pet. 18-25). As noted in the text that follows, the court of appeals had no occasion even to consider whether the appellate issues identified by petitioner Crabtree satisfied the statutory standard for substantiality. The court of appeals necessarily did reject that contention as raised by petitioner Canale, although his argument in the court of appeals, like that presented in this Court, focused almost entirely on the ex post facto issue and the standard applied by the district court to assess the substantiality of his appeal. See Pet. App. 2-3. As in this Court, Canale merely set forth his factual assertions without citing any authority suggesting that his claims have legal merit. In the circumstances, there is no occasion for this Court to review the court of appeals' determination that Canale had not demonstrated that his underlying appeal was sufficiently meritorious to warrant his admission to bail pending appeal.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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